Supreme Court, U.S.
FILED
No. 95 1472 MAR 14 1996
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

LORETTA KLUMP,

Petitioner,

v.

J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, A PARTNERSHIP and ACCIDENT AND INJURY REFERRAL SERVICE,

Respondents.

Petition For Writ Of Certiorari To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit incorrectly interpreted the holding in *Goldzier and Rodgers v. Poole*, 83 Ill.App. 469 (1st Dist. 1898), which requires a plaintiff in a legal malpractice action to prove the tortfeasor in the underlying case "solvent", by further requiring that the plaintiff in a legal malpractice action must also prove the extent to which a judgment in the underlying case would be collectible against the tortfeasor.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Loretta Klump respectfully petitions that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on December 18, 1995. Petitioner's request for rehearing with suggestion for rehearing en banc was denied on January 12, 1996.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (App. 1 and App. 15) is reported at 71 F.3d 1368 (7th Cir. 1995) and 64 USLW 2401. The Court of Appeals' order upon denial of the petition for rehearing with suggestion for rehearing en banc is unreported. The memorandum opinion and orders of the district court below are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1995 (App. 15) and a timely petition for rehearing was denied on January 12, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Factual Background

On January 26, 1987, Loretta Klump's vehicle was struck in the rear by a station wagon driven by Curt Eaves as she was stopped in traffic. Mrs. Klump was severely injured in the collision which took place near Troy, Illinois.

Mrs. Klump saw a television ad of the Accident and Injury Referral Service while she was with her husband in North Carolina where he had been temporarily assigned by his employer. She called the Service and was referred to defendant, J. David Duffus, Jr., a North Carolina lawyer who was a partner in the North Carolina law firm of DIXON, DUFFUS & DOUB, as well as a partner in the Accident and Injury Referral Service. Mrs. Klump hired Duffus and his firm to represent her in her claim against Eaves for her injuries sustained in the Illinois auto collision.

Duffus did not file suit on Mrs. Klump's behalf and the Illinois Statute of Limitation expired.

On September 6, 1990, Mrs. Klump filed suit against the defendants' in the Circuit Court of the Third Judicial District, Madison County, Illinois, the county where the auto collision occurred. Defendants' removed the action to the United States District Court for the Southern District of Illinois based upon diversity of citizenship, 28 U.S.C. § 1332 (1993).

Mrs. Klump alleged theories of negligence and breach of contract and sought to recover for her injuries received in the auto collision including past and future

medical and medically related expenses; disability, pain and suffering in the past and future; and the value of her loss of earning capacity in the past and in the future.

II. Proceedings Below

Defendants moved for partial summary judgment asserting that Mrs. Klump was limited in her right to recover damages from the defendants by the amount she could prove that she would have been able to collect from Eaves in the auto case citing *Goldzier and Rodgers v. Poole*, 83 Ill.App. 469 (1st. Dist. 1899). Defendants further argued that it was plaintiff's burden to prove the amount collectible from Eaves.

In its decision denying defendants' motion on February 22, 1993 (App. 24), the trial court held that all *Goldzier* required plaintiff to plead and prove was the solvency of the defendant in the underlying claim. The trial court held that once plaintiff proved that the defendant in the underlying case was able to pay a judgment in part or in whole, plaintiff could then collect the full sum of her damages from the attorney whose negligence prevented her from collecting anything in the underlying case. The trial court cited as additional support for it position *Hoppe v. Ranzini*, 385 A.2d 913 (N.J. Super. 1978), pointing out that a defendant's negligence need not be the sole proximate cause of the plaintiff's damages, but only a proximate cause and that a tortfeasor is liable for all reasonably foreseeable damages. The court also noted with approval that such a concept supported the fiduciary nature of the attorney-client relationship and the professional effect upon the public welfare.

On September 10, 1993 the trial court granted plaintiff's Motion in Limine (App. 32) excluding any evidence of the poverty, wealth or general financial condition of Curt Eaves or insurance coverage of any party. Defendants failed to respond to plaintiff's motion, but the trial court ruled on the motion on the merits, holding that *Goldzier* merely requires plaintiff to show that the defendant in the underlying case was solvent and that some part of the judgment could be collected in order to collect her full actual damages from a negligent attorney.

The case proceeded to trial and on February 17, 1994 the jury returned an itemized verdict totaling $474,000.00 in favor of Mrs. Klump and against all defendants. Judgment was entered on the verdict on February 18, 1994 (App. 37).

Defendants filed a Post-Trial Motion on March 4, 1994 and again raised the collectibility issue, among others. The trial court denied the motion on October 18, 1994 (App. 17).

Defendants filed a timely Notice of Appeal and the oral argument took place on November 9, 1995 before Judges Cummings, Wood and Easterbrook. The panel's opinion and judgment was issued on December 18, 1995 (App. 1 and App. 15).

The Seventh Circuit reversed the verdict holding that the trial court abused its discretion by precluding the introduction of evidence regarding Eaves's financial ability to pay a judgment against him and remanded the case to the trial court for a new trial to determine the amount of money Mrs. Klump would have actually collected from

Eaves had Duffus filed Mrs. Klump's lawsuit in a timely manner.

The Seventh Circuit affirmed on the question of jurisdiction and did not address defendants' other issues on appeal.

The basis for the Seventh Circuit's decision was its interpretation of the holding of *Goldzier*. The Appellate Court held that "in malpractice actions against attorneys who negligently cause their client not to be awarded a judgment to which their client was entitled, the plaintiff must prove that the hypothetical defendant was solvent in order to receive more than nominal damages." The Seventh Circuit further held that *Goldzier* never reached the issue of the extent of actual damages to which a plaintiff is entitled if the hypothetical defendant is only partially able to satisfy a judgment against him. The Appellate Court then seized upon the phrase: "only to the extent of actual injury" to hold that it is the plaintiff's burden in a legal malpractice case to prove the amount of money she would have actually collected from the defendant in the underlying case so as to avoid a "windfall" for the plaintiff.

REASONS FOR GRANTING THE WRIT

Petitioner seeks review by this court because the decision of the court of appeals is directly contrary to the law of Illinois and is a misinterpretation contrary to the holding of *Goldzier and Rodgers v. Poole*, 83 Ill.App. 469 (1st Dist. 1899) and contrary to the later holdings of the

Appellate Court of Illinois, changing the law of Illinois since 1899.

The need for supervision by this Court is great where, as here, the Court of Appeals has taken upon itself the task of establishing public policy for a state in an area so uniquely of state interest; the regulation of the practice of law within its borders. The result of this decision is that clients who sue their lawyers for negligent representation in the federal courts of Illinois have a heavier and more complex burden of proof and are limited in their ability to recover damages to a far greater extent than clients who sue their lawyers in the state courts of Illinois.

I. The Decision Of The Court Of Appeals Is A Misinterpretation Of The Holding In *Goldzier and Rodgers v. Poole*, 83 Ill.App. 469 (1st Dist. 1899).

Solvent is defined by Black's Law Dictionary 5th Ed. as the "ability to pay debt in the usual and ordinary course of business." The terms "solvent", "insolvent" and "solvency" appear eleven times in the decision *Goldzier and Rodgers v. Poole*, 83 Ill.App. 469, 470, 471, 472, 473 (1st Dist. 1899). The term "collectible" does not appear in the opinion of the Court although it does appear twice in the statements of counsel preceding the opinion. *Goldzier*, 470.

The Appellate Court in this case chose to ignore the *Goldzier* court's reliance upon the terms "solvent" and "solvency" to describe that which an Illinois plaintiff in a legal malpractice case must prove as to the tortfeasor to collect damages for her actual injuries in the underlying

case. The Appellate Court instead took the term "actual injury" out of context in the opinion and equated this with the requirement that the jury in a legal malpractice case be allowed to speculate as to the amount of plaintiff's damages she would be able to collect for her actual injuries from a particular defendant and thus limit her recovery in a legal malpractice case.

"Actual injury" is a term capable of two meanings; that adopted by the Appellate Court or it can be interpreted to mean that, once a defendant's solvency is established, and the extent of plaintiff's injury is established and valued by the trier of fact, plaintiff may collect the whole amount of her "actual injury" in the underlying cause from the defendant lawyer. This latter interpretation is the holding of *Goldzier* and the law of Illinois.

No one suggests that Loretta Klump was injured any less than would justify the $474,000.00 she was awarded by the jury to compensate her for her "actual injury". There was nothing hypothetical about her pain and suffering, disability, loss of earning capacity and medical expenses caused in the auto collision which was the basis of the underlying cause of action.

The holding in *Goldzier* is clear simply by reading the plain English of the case:

> "But one question is presented which would need be considered, *viz.*, as to the burden of proof of solvency or insolvency of the Bouton Foundry Company at the time when the suit of appellee against that company was permitted to be dismissed . . . Counsel for appellee contend that the burden of showing insolvency of the company, which would have made the claim of

> appellee of no value at the time of dismissal of the suit, is upon appellants; while counsel for appellants contend that it was incumbent upon appellee to show that his claim was of value when his suit was dismissed, *i.e.*, that the company was then solvent . . . "
>
> "In suits against attorneys at law for damages by reason of negligence of the attorney in the management of their client's litigation, it is a general rule that the extent of the damages must be affirmatively shown, for the attorney is only liable for the actual injury which his client has sustained, and not necessarily for the nominal amount of the client's demand . . . "
>
> "Hence, when a claim is alleged to have been lost by the attorney's negligence, in order to recover beyond nominal damages, it must be shown that it was a subsisting debt, and that the debtor was solvent." *Goldzier* at 470-471.

That the trial court chose to quote a different portion of the decision in support of its reasoning is immaterial. The result is the same. The Appellate Court is in error.

II. The Appellate Court's Interpretation Of *Goldzier* Is Also Inconsistent With Other Illinois Courts' Opinions.

The Appellate Court misinterpreted and, in some cases, added language to other Illinois decisions to improperly bolster their decision. *Sheppard v. Krol*, 218 Ill.App.3d 254, 161 Ill.Dec. 85, 578 N.E.2d 212, 216 (1st Dist. 1991) held that " . . . the plaintiff must prove the existence of a solvent defendant in the underlying claim", citing *Goldzier*. The court in *Sheppard* based its ruling on

the fact that the plaintiff could not identify the manufacturer of a forklift who would have been the responsible party defendant in the underlying product liability case. *Sheppard* at 216-217. The quotation from *Sheppard* in the reviewing court's decision is surprising in that there is no such quotation in the decision. The actual quotation is:

> "Plaintiff must show that but for his lawyer's negligence he would have recovered."

This quotation appears at page 217. not page 216 as cited by the reviewing court. It refers to the plaintiff's burden to prove liability in the underlying case. The Appellate Court added the bracketed words to the quotation "[From the hypothetical defendant.]" which changes its meaning in context dramatically so that it supports the Appellate Court. It actually refers to the fact that if plaintiff couldn't identify the manufacturer, he couldn't have recovered in the underlying cause because he didn't know who to sue. In short, he couldn't prove the underlying case. It had nothing to do with solvency or collectibility.

The quotation from *Kohler v. Woolen, Brown and Hawkins*, 15 Ill.App.3d 455, 458, 304 N.E.2d 677, 678 (4th Dist. 1973) is from introductory general dicta and refers to *Goldzier* and *Piper v. Green*, 216 Ill.App. 590 (4th Dist. 1920). The basis for the decision, affirming a judgment against the attorneys, was based upon principles of estoppel and the discovery rule as it applied to the statute of limitations for lawyer malpractice. Neither solvency nor collectibility were at issue.

Piper v. Green, 216 Ill.App. 590 (4th Dist. 1920) holds only that " . . . it was necessary for appellants to allege

and prove their claim was against a solvent party" and is consistent with plaintiff's position.

Nika v. Danz, 199 Ill.App.3d 296, 556 N.E.2d 873, 886 (4th Dist. 1990) states in the factual portion that: "It was determined before trial that as part of his *prima facie* case, plaintiff had to prove the solvency of US, Inc." and is also consistent with plaintiff's position.

Thus it can be seen the Appellate Court's decision is contrary to other holdings of Illinois courts and contrary to the statement in the Seventh Circuit's opinion. Once a plaintiff has proven that the potential defendant in the underlying case was solvent, plaintiff may then recover from the malpracticing lawyer all of her actual injuries in the underlying case.

III. Requiring A Jury To Determine Collectibility As Opposed To Solvency Requires The Jury To Improperly Speculate On The Future And Raise An Impossible Hurdle For The Plaintiff.

" . . . [O]ur legal system does not permit liability based upon conjecture." *Sheppard* at 217. Allowing a jury to speculate as to collectibility of a judgment against the tortfeasor in the underlying case of legal malpractice is the corollary to the above-mentioned principal and allows speculation to run rampant. Solvency at the time of the error can be proved with reasonable effort since one need only prove that the underlying defendant was able to pay his or her ordinary expenses at the time.

Going beyond this threshold question requires a jury to guess with no reliable guide as to events occurring far

into the future. As the trial court pointed out, a judgment may be valid for twenty years in Illinois. 735 ILCS 5/12-108, 5/13-218. Eaves, the driver in the underlying auto case had insurance. Eaves had a marketable skill as a machinist and was, at the time of his deposition, and before, regularly employed at a good rate of pay and had acquired a single family residence (App. 25). In the future, it is possible that he could start a successful business, inherit money or even win a lottery. The Appellate Court, in a footnote, also pointed out that Eaves could have filed bankruptcy. Many people, however, feel a moral, ethical or religious obligation to pay their just debts and either do so or spend their lives attempting to do so.

This court should not be guided by a cynical view of human nature. A jury should not be allowed to guess what events will or will not occur in an individual's life which may or may not make a judgment "collectible".

The court should also reflect upon the burden it is placing on a claimant to prove collectibility.

What legal or constitutional principal would allow a plaintiff to delve into the financial, personal and familial background of the tortfeasor in the underlying cause of action once the cause of action against him is barred? This individual is not a party to the suit and his privacy rights would make meaningful proof or discovery of the proof of collectibility impossible for a plaintiff. (See for example: 215 ILCS 5/1014, Insurance Privacy; 205 ILCS 110/49, Financial Records Privacy; Illinois Constitution, Art. 1 § 6; *Griswold v. Connecticut*, 38 U.S. 479, 85 S.Ct. 1678 (1965) and Restatement (2d), Torts § 652). There is no

other cause of action where the law makes proof of damages impossible. This decision could and would.

IV. That Eight Or Ten States Of Fifty Have Ruled As The Appellate Court Ruled Is Not A Justification To Change The Law Of Illinois.

The Appellate Court claims that its ruling placing the burden on plaintiff to prove the amount she could have collected in the underlying case as well as the amount she was entitled to recover for her actual injuries is consistent with "virtually every other court that has addressed the collectibility issue" and "is the general rule" and is "the position taken by the majority of courts." Even if this is true, it is immaterial since it is not the law in Illinois.

The majority of courts referred to is eight, arguably ten, of fifty which is certainly far short of a majority. With all due respect, whether or not it should be the rule in Illinois, is not an inquiry a federal court should be making in the face of clear Illinois authority to the contrary. See *Goldzier*. An inquiry into the laws of other states is only relevant if the courts of the state in which the law is being interpreted has not spoken. Where, as here in *Goldzier*, the Illinois courts have spoken: the federal appellate courts should not act as a state supreme court and change the law and public policy of Illinois no matter what other states may do. It would not matter at all if the forty-nine other states had adopted a different position; it should be left to Illinois courts to make such a momentous decision which could effectively deprive many litigants of recourse against their negligent lawyers. It is not the duty

or right of federal courts of appeal to bring the various states into conformity on matters of state law.

V. The Appellate Court Should Have Certified The Question To The Illinois Supreme Court *Sua Sponte* Under Seventh Circuit Rule 52 Before Changing The Law Of Illinois.

If the Seventh Circuit believed the law of Illinois was unclear or that "the court in *Goldzier* never reached the issue before us: the extent of actual damages to which a plaintiff is entitled if a hypothetical defendant is only partially able to satisfy a judgment against him", it was incumbent upon the Appellate Court *sua sponte* to refer these questions to the Illinois Supreme Court under Seventh Circuit Rule 52.

This is particularly true in a legal malpractice case as the regulation of the practice of law is a uniquely state concern. Federal courts do not license lawyers to practice law until they have been admitted to some state court. Federal courts should not make rules for the regulation of the practice of law in state courts. The effect of the Appellate Court's ruling in this case does so.

Illinois Supreme Court Rule 20 allows that court to accept the referral of questions from the Seventh Circuit Court of Appeals. The Appellate Court should have done so.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 94-3756
LORETTA KLUMP,

Plaintiff-Appellee,

v.

J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, a partnership, and ACCIDENT AND INJURY REFERRAL SERVICE,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 90-C-3772 – William D. Stiehl, *Chief Judge.*

ARGUED NOVEMBER 9, 1995 – DECIDED DECEMBER 18, 1995

Before CUMMINGS, WOOD, Jr., and EASTERBROOK, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Loretta Klump retained J. David Duffus, Jr., a Greenville, North Carolina lawyer, to represent her in an Illinois lawsuit against the driver of the car that injured her. Mr. Duffus, however, did not file Klump's suit prior to the lapsing of the Illinois Statute of Limitations.[1] Klump subsequently sued Duffus, the Law

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[1] The record does not demonstrate whether Duffus filed Klump's lawsuit after the lapsing of the statute, or whether he failed to file it altogether.

Offices of Dixon, Duffus & Doub, and the Accident and Injury Referral Service[2] for legal malpractice. The jury awarded Klump $474,000: the amount it determined that she would have been awarded if Duffus had filed her claim against the driver in a timely manner. The defendants appeal that verdict, claiming *inter alia* that the district court erred in precluding the introduction of evidence as to Klump's ability to collect the hypothetical judgment. For the reasons discussed below, we reverse the judgment of the district court and remand the case for a new trial.

BACKGROUND

Loretta Klump was injured in an automobile accident that occurred on January 26, 1987, near Troy, Illinois, when her vehicle was struck by a station wagon driven by Curt Eaves. Following the accident, the employment of Klump's husband required that the couple move to North Carolina. While there, Klump retained Duffus to represent her in an Illinois lawsuit against Eaves. Shortly thereafter, Klump and her husband moved to California and then returned to Troy, Illinois, where they still reside. Duffus failed to file Klump's lawsuit prior to the lapsing of the Illinois Statute of Limitations and as a result was sued by Klump for legal malpractice. The defendants admitted liability for all damages that were proximately caused by the automobile accident and Duffus's failure to timely file suit against Eaves.

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[2] The Accident and Injury Referral Service had referred the matter to Duffus.

Prior to trial, the district court granted Klump's motion in limine, deciding that no evidence could be presented to the jury regarding Eaves's ability to pay the hypothetical judgment. Defendants' offer of proof on the issue established that Eaves was unemployed, had no assets with which to satisfy a judgment against him, and had only a $25,000 insurance policy with respect to the accident. The action proceeded to trial on February 14, 1994, and a jury awarded Klump a judgment against the defendants in the amount of $424,000. The defendants appeal that judgment and we have jurisdiction over their appeal pursuant to 28 U.S.C. § 1291.

DISCUSSION

1. *Personal Jurisdiction*

The defendants initially challenge the judgment below on the ground that the district court did not properly have personal jurisdiction over them. The determination of personal jurisdiction is a question of law that we review *de novo*. *McIlwee v. ADM Indus., Inc.*, 17 F.3d 222, 223 (7th Cir. 1994). A federal district court exercising diversity jurisdiction has personal jurisdiction over a nonresident "only if a court of the state in which it sits would have such jurisdiction." *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990), certiorari denied, 499 U.S. 947.

The Illinois long-arm statute was amended in 1989 to provide that an Illinois court "may . . . exercise jurisdiction on any . . . basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." 735 ILCS 5/2-209(c). Paragraph 2-209(c) is now

coextensive with the due process requirements of the United States Constitution. *FMC v. Varonos*, 892 F.2d 1308, 1310 n. 5 (7th Cir. 1990). Thus "if the contacts between the defendant and Illinois are sufficient to satisfy the requirements of due process, then the requirements of both the Illinois long-arm statute and the United States Constitution have been met, and no other inquiry is necessary." *L.B. Foster Co. v. Railroad Serv., Inc.*, 734 F. Supp. 818, 822 (N.D. Ill. 1990).

The defendants do not challenge the fact that Duffus's negligence caused harm to Klump. Instead, they focus upon the fact that the action against them is largely based upon Duffus's negligent *failure to act*, which they argue "occurred" in North Carolina. Therefore, they argue that Duffus committed no tort within Illinois boundaries and cannot be subject to jurisdiction there. In support of this position, they cite *Yates v. Muir*, 112 Ill.2d 205, 492 N.E.2d 1267 (1986). The court in *Yates* held that the allegedly negligent action of a Kentucky attorney who failed to file an appeal in Illinois did not "occur" in Illinois such that the attorney would be subject to Illinois jurisdiction.[3]

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[3] In *Yates*, a Kentucky attorney was hired to represent the plaintiff in asserting a disability retirement claim under the Civil Service Reform Act of 1978, 5 U.S.C. Sec. 1101. The claim was filed with the Medical Director of the Office of Personnel Management in Washington, D.C., and all of the legal services associated therewith were performed exclusively in Kentucky. The claim "did not require the attorney to appear in any State Court or Federal Court in Illinois." *Id.* at 209; 492 N.E.2d at 1269. The allegedly negligent act of the attorney was in failing to file in Illinois a timely appeal of the plaintiff's rejected claim. The only connection with Illinois was that regulations promulgated

However, *Yates* was decided prior to the amendment of 735 ILCS 5/2-209 that extended the Illinois long-arm statute to the limit allowed by the due process standards of the United States Constitution. See *Varanos, supra.* Those standards have repeatedly been held to allow jurisdiction over a defendant who acts outside of a State's boundaries, but causes harm to an individual within the State, provided that it comports with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316; *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."); *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774; *Calder v. Jones,* 465 U.S. 783, 788-790. Jurisdiction in such situations is proper where the defendant had "minimum contacts" with the forum State such that he had "fair warning" that he might be required to defend there, and where he has not presented a compelling case that it is unreasonable to do so. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472-478.[4] The

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under the Civil Service Reform Act required that any appeal from the decision of the Medical Director be "filed within 20 days of the date of the decision, at the Chicago regional office." *Id.* at 207; 492 N.E.2d at 1267.

[4] Due process standards under the Illinois Constitution similarly require that jurisdiction be asserted only when it is "fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois." *Rollins v. Ellwood,* 141 Ill.2d 244, 275, 565 N.E.2d 1302, 1316 (1990).

requirement of "fair warning" meets due process standards by "giv[ing] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297.

The "fair warning" requirement is met if the defendant "purposely avails itself of the privilege of conducting activities within the forum State thereby invoking the benefits and protections of the forum's laws." *Burger King*, 471 U.S. at 471-478. Thus the proper focus of our inquiry is not Duffus's precise locale when the Illinois Statute of Limitations lapsed, but whether the contacts proximately resulting from his representation of Klump created a sufficient connection with Illinois such that he "personally availed" himself of the privilege of conducting activities there. Two recent Illinois cases are instructive on the issue.

In *Ores v. Kennedy*, 218 Ill.App.3d 866, 578 N.E.2d 1139 (1st Dist. 1991), an Illinois plaintiff sued an Illinois law firm for legal malpractice. The law firm impleaded a Texas attorney who had been retained on the plaintiff's behalf to admit an estate to probate in Texas. The Texas attorney had made telephone calls and written letters to the Continental Bank in Chicago and billed the plaintiffs directly for those contacts. The court held that the attorney had fair warning that he might be required to defend himself in Illinois because he "personally directed" his activities at Illinois residents. *Id.* at 873; 578 N.E.2d at 1144. Similarly, the court in *Culligan Int'l v. Wallace, Ross & Sims*, 213 Ill.App.3d 230, 650 N.E.2d 565 (4th Dist.

1995), found that it was not unreasonable for a nonresident attorney to defend himself in Illinois in a malpractice action stemming from a West Virginia lawsuit. The court concluded that despite the fact that the lawsuit did not take place in Illinois, the attorney had "purposely availed" himself of Illinois because he had been in contact with his Illinois client in person, by telephone, and by mail. *Id.* at 232; 650 N.E.2d at 568.

Duffus's relationship with regard to Illinois is as follows. He was retained to handle an Illinois lawsuit involving an automobile accident that occurred between two Illinois residents within the boundaries of Illinois. After hiring Duffus in North Carolina, and following a brief stay in California, Klump returned to Troy, Illinois, where she resided during much of Duffus's trial preparation. In the course of that preparation Duffus was in frequent telephonic and written contact with Klump, her treating physicians, her insurance carrier, and Eaves's insurance carrier, all of whom were located in Illinois. For that matter, the defendants have not notified us of any party relevant to the litigation who was not located in Illinois. It is clear that when Duffus agreed to represent Klump he was aware that the case would exclusively involve Illinois parties, Illinois law, and would take place in Illinois.[5]

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[5] Defendants argue that the case against Eaves could have been filed in federal court in North Carolina based upon diversity jurisdiction. Klump responds that she has at all times remained an Illinois resident, thereby preventing diversity jurisdiction, because she retained her Illinois driver's license and has, at all relevant times, owned a home in Troy, Illinois. However, whether diversity of citizenship existed between

We conclude that Duffus "[personally] availed [himself] of the privilege of conducting business in [Illinois]." *Burger King*, 471 U.S. at 475. Thus it does not "offend traditional notions of fair play and substantial justice" to hold the defendants subject to jurisdiction there. *International Shoe Co.*, 326 U.S. at 316. Furthermore, the defendants have not presented us with any evidence, much less a compelling case, that the exercise of Illinois jurisdiction is unreasonably burdensome upon them. See *Burger King*, 471 U.S. at 476-478.

2. *Collectibility*

In a malpractice action against an attorney for failing to file his client's claim within the limitations period, the plaintiff essentially must present a "trial-within-a-trial," proving both the underlying claim against the hypothetical defendant and the claim against the negligent attorney. *Nika v. Danz*, 199 Ill.App.3d 296, 308, 556 N.E.2d 873, 882 (4th Dist. 1990). Here defendants conceded that Duffus was negligent and that the suit against Eaves would have been successful. Defendants do not challenge the jury's determination that $424,000 was the amount of the judgment Klump would have been awarded against

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Klump and Eaves does not alter the fact that the case would have been filed in Illinois because Eaves was not subject to personal jurisdiction in any other forum. We are simply unpersuaded by the defendants' attempt to argue that Duffus could have filed the case in North Carolina and "*in the event* that [Eaves] raised a [personal] jurisdiction issue and the court dismissed the case for lack of jurisdiction, [Klump] would have had one year in which to refile the case in Illinois." [Def. Reply Br. 2] (emphasis added).

Eaves. Rather, defendants argue that the district court erred in precluding the introduction of evidence regarding Eaves's ability to pay that judgment. We will order a new trial based on erroneously excluded evidence only if we determine that the district court abused its discretion in excluding that evidence. *Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (7th Cir. 1994).

The district court's decision to exclude the collectibility evidence was largely based upon its interpretation of *Goldzier v. Poole*, 82 Ill.App. 469 (1899). The district court read *Goldzier* to allow a plaintiff in a malpractice action a full recovery of the amount of the underlying hypothetical judgment if the plaintiff could prove that any portion of that judgment would have been collectible:

> "To establish damages that would have been recovered on the underlying claim, Illinois law requires the plaintiff to prove 'what the actual injury is, by showing validity of the demand which he has lost, and the fact that it would *in part or in whole* have been realized had the attorney not been negligent.' *Goldzier v. Poole.*" [Memorandum and Order dated Sept. 10, 1993, p. 2].

In the district court's view, *Goldzier* "holds that plaintiff can satisfy her burden by showing that at least part of any judgment against Eaves would have been recovered." *Id.*

We believe the district court's focus on the *Goldzier* phrase "in part or in whole" was too narrow, leading it to a result that was beyond the holding of the *Goldzier*. That case involved two attorneys – Goldzier and Rodgers – who negligently failed to appear in court on April 20,

1893, when the case of Poole – their client – against the Bouton Foundry Company was called. Their failure to appear resulted in the dismissal of Poole's case for want of prosecution. On July 1, 1893, the Bouton Foundry Company became insolvent. Poole subsequently sued Goldzier and Rodgers and was awarded a judgment against them that reflected the amount of the hypothetical judgment Poole would have been awarded against the Bouton Foundry Company had Goldzier and Rodgers properly appeared in court. Goldzier and Rodgers appealed the judgment and the Illinois appellate court remanded the case. The court held that Poole had the burden to prove that the Bouton Foundry Company was not insolvent on April 20, 1893, the date of the attorneys' negligence.

The sentence of *Goldzier* relied upon by the district court, when read in full, states,

> "[w]e are inclined to adopt that rule as the safer and supported by better authority, which, permitting a recovery beyond nominal damages only to the extent of actual injury, makes it the burden of the plaintiff to establish his measure of damages, and to show what the actual injury is, by showing the validity of the demand which he has lost, and the fact that it could in part or in whole have been realized had the attorney not been negligent." *Goldzier* at 472.

Thus the holding of *Goldzier* can properly be stated as follows: in malpractice actions against attorneys who negligently cause their client not to be awarded a judgment to which that client was entitled, the plaintiff must

prove that the hypothetical defendant was solvent in order to receive *more than mere nominal damages.*

The court in *Goldzier* never reached the issue before us: the *extent* of actual damages to which a plaintiff is entitled if the hypothetical defendant is only partially able to satisfy a judgment against him. However, in its holding the court did use the phrase "only to the extent of actual injury." *Id.* Later in the opinion the court again stated that "the right to substantial damages, as are here awarded, should depend upon *the extent of the actual injury.*" *Id.* (emphasis added). In a malpractice action, a plaintiff's "actual injury" is measured by the amount of money she would have actually *collected* had her attorney not been negligent. A plaintiff is to be returned only to the same position she would have occupied had the tort not occurred. Had Duffus filed Klump's case in a timely manner and thus not committed the tort, Klump's position would have been that of a person possessing a $424,000 judgment against an individual who was unemployed, had no assets, and had only a $25,000 insurance policy. Hypothetical damages above the amount that Klump could genuinely have collected from Eaves are not a legitimate portion of her "actual injury;" awarding her those damages would result in a windfall. Thus we believe that the district court was incorrect to state that a plaintiff is entitled to the full amount of an underlying judgment if she can only prove that the hypothetical defendant was able to pay one dollar of it.

Our interpretation of *Goldzier* is consistent with that of other Illinois courts. See *Sheppard v. Krol*, 218 Ill.App.3d 254, 578 N.E.2d 212, 216 (1st Dist. 1991) ("Plaintiff must show that but for his lawyer's negligence he would have

recovered [from the hypothetical defendant].") (emphasis added); *Kohler v. Woolen, Brown & Hawkins*, 15 Ill.App.3d 455, 458, 304 N.E.2d 677, 678 (4th Dist. 1973) ("In an action for legal malpractice a plaintiff has the burden of showing the validity of the demand which he lost and that it *could have been realized* if the attorneys had not been negligent.") (emphasis added). Moreover, it is consistent with the position of virtually every other court that has addressed the collectibility issue. See, *e.g., Fernandes v. Barrs*, 641 So.2d 1371, 1374 (Fla. Dist. Ct. App. 1994) ("The general rule is that the client/plaintiff in a legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation . . . and that any judgment which could have been recovered would have been collectible."); *Haberer v. Rice*, 511 N.W.2d 279, 285 (S.D. 1994) (holding that a required element of a plaintiff's malpractice claim is "the amount of the judgment and that the judgment was collectible").[6]

While we are mindful that a minority of courts have placed the burden on the defendant to prove the uncollectibility of the underlying judgment,[7] we conclude that

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[6] See also *Payne v. Lee*, 686 F. Supp. 677, 678 (E.D.Tenn. 1988); *Sitton v. Clements*, 257 F. Supp. 63, 67 (E.D.Tenn. 1966); *Little v. Matthewson*, 114 N.C.App. 562, 568, 442 S.E.2d 567, 571 (1994); *Alva v. Hurly, Fox, Selig, Caprari & Kelleher*, 593 N.Y.S.2d 728, 730 (Sup. Ct. 1993); *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989); *Eno v. Watkins*, 229 Neb. 855, 856, 429 N.W.2d 371, 372 (1988); *Jourdain v. Dineen*, 527 A.2d 1304, 1306 (Me. 1987); *Whiteaker v. State*, 382 N.W.2d 112, 114 (Iowa 1986); *Hoppe v. Ranzini*, 158 N.J.Super. 158, 168, 385 A.2d 913, 919 (1978); *McDow v. Dixon*, 138 Ga.App. 338, 342, 226 S.E.2d 145, 147 (1976).

[7] See, *e.g., Jourdain v. Dineen*, 527 A.2d 1304 (Me. 1987).

the burden is more properly placed on the plaintiff to prove the amount she would have actually collected from the original tortfeasor as an element of her malpractice claim. This is the position taken by the majority of courts and is more consistent with a plaintiff's burden of proof in negligence actions generally. See Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial – A Critical Analysis of Unique Concepts: Areas of Unconscionability,* 73 Marq.L.Rev. 40, 52 (1989) ("To predicate an award of damages upon both the requirement that a judgment would have been recovered and that it would have been collectible . . . requires a showing of causation . . . that is conceptually no different from that required in negligence cases generally.").

Finally, we note that the district court stated that its position on collectibility was consistent with the concerns of public policy, which Judge Stiehl believed discourages allowing defendants "to benefit from the fortuity that a judgment debtor might not have been able to pay all of plaintiff's damages." [Memorandum and Order dated Sept. 10, 1993, p. 3].[8] However, compensatory damages

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[8] The district court also based its decision upon the fact that Klump would have had twenty years to collect any judgment against Eaves. See 735 ILCS 5/12-108, 5/13-218. Therefore, in the district court's view, Eaves's current ability to pay the judgment was irrelevant because his financial position "could change during the twenty-year period. However, this argument overlooks the fact that the judgment against Eaves would have been immediately dischargeable in a bankruptcy proceeding. See *Perez v. Campbell,* 402 U.S. 637, 648 (" '[O]ne of the primary purposes of the Bankruptcy Act' is to give debtors 'a new opportunity in life and a clean field for future effort, unhampered by the pressure and discouragement of pre-

exist only to compensate the plaintiff, not to punish the defendant. If Klump could not have collected a full judgment from Eaves, then Duffus's negligence did not injure her in that amount; she simply could not lose what she could never have had.[9]

CONCLUSION

The district court's assertion of personal jurisdiction over the defendants was proper. However, the court abused its discretion by precluding the introduction of evidence regarding Eaves's financial ability to pay a judgment against him. The case is remanded for a new trial where both parties should be allowed to present evidence as to Eaves's employment status, financial position, asset ownership, insurance coverage, and all other evidence relevant to determining the amount of money that Klump would have actually collected from Eaves had Duffus filed Klump's Illinois lawsuit in a timely manner.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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existing debt' . . . Congress intended this 'new opportunity' to include freedom from most kinds of pre-existing tort judgments.").

[9] Because we are remanding the case for a new trial based on the collectibility issue, we need not address defendants' other issues on appeal.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: December 18, 1995

BEFORE: Honorable Walter J. Cummings, Circuit Judge

Honorable Harlington Wood, Jr., Circuit Judge

Honorable Frank H. Easterbrook, Circuit Judge

No. 94-3756

LORETTA KLUMP,
Plaintiff-Appellee

v.

J. DAVID DUFFUS, DIXON, DUFFUS & DOUB LAW OFFICES, and ACCIDENT & INJURY REFERRAL SERVICES,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division
No. 90 C 3772, William D. Stiehl, Judge

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED, in accordance with the decision of this court entered this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 12, 1996.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

LORETTA KLUMP, Plaintiff-Appellee, No. 94-3756 vs. J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, a partnership, and ACCIDENT AND INJURY REFERRAL SERVICE, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Illinois. No. 90-C-3772 William D. Stiehl, *Chief Judge.*

ORDER

On consideration of the petition for rehearing en banc (construed as a petition for rehearing with suggestion for rehearing en banc) filed by plaintiff-appellee on January 2, 1996, all of the judges on the original panel have voted to deny a rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LORETTA KLUMP, Plaintiff, v. J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, a partnership, and ACCIDENT AND INJURY REFERRAL SERVICE, Defendants.	)	CAUSE NO. 90-CV-3772-WDS

MEMORANDUM AND ORDER

STIEHL, District Judge:

Before the Court is defendants' post-trial motion. This case was tried before a jury which resulted in a verdict for plaintiff in the amount of $474,000. Defendants move the Court to enter judgment for the defendants notwithstanding the verdict, or in the alternative for a new trial.

In a recent opinion, the Seventh Circuit established a new standard for review of the sufficiency of the evidence in diversity actions, *Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330 (7th Cir. 1994). The court stated:

> [I]t is entirely consistent to say that although state law defines the elements of a claim and the burden of persuasion, federal law defines the standard for evaluating the sufficiency of the evidence. . . . We now adopt the federal reasonable-person standard across the board: pre-trial, mid-trial, post-trial, and on

> appeal, for evaluating both the merits and the quantum of relief. Contrary decisions are no longer authoritative.

Id. at 335. Therefore, in evaluating defendants' motion for judgment notwithstanding the verdict and motion for new trial, the Court will use this standard of review.[1]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Motions for judgment notwithstanding the verdict are brought pursuant to Fed. R. Civ. P. 54(b). Defendants assert as grounds for their motion for judgment notwithstanding verdict that the Court's previous rulings on personal jurisdiction and collectibility were in error. Defendants reassert their previous arguments raised on these issues, and do not raise any new arguments. Viewing the evidence in the light most favorable to plaintiff, the Court finds that a reasonable juror, reviewing the evidence presented could return a verdict for the plaintiff. Defendants have not set forth new and compelling grounds for the Court to reverse its prior rulings, and they shall remain undisturbed. Defendants' motion for judgment notwithstanding verdict is, accordingly, **DENIED.**

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[1] The standard in this Circuit before the *Mayer* pronouncement was that state law controlled a motion for j.n.o.v., *Gelderman v. Financial Mgt. Consultants*, 27 F.3d 307, 310 (7th Cir. 1994), whereas federal law controlled both a motion for new trial, and a challenge to the sufficiency of the evidence on damages. *Mayer*, 29 F.3d at 334. It is, however, clear that the Court is to apply the federal "reasonable juror" standard to these inquiries.

MOTION FOR NEW TRIAL

The Seventh Circuit has set forth the following standard for reviewing a motion for new trial. "[A] new trial can be granted only when the jury's verdict is against the clear weight of the evidence," *Wassell v. Adams*, 865 F.2d 849, 854 (7th Cir. 1989), *quoted in Hardin, Rodriguez & Boivin v. Paradigm Ins.*, 962 F.2d 628, 640 (7th Cir. 1992), "the damages were excessive, or that, for other reasons, the trial was not fair to the party moving." *Timmerman v. Modern Industries, Inc.*, 960 F.2d 692, 698 (7th Cir. 1992).[2]

The defendants raise several points of error on which the Court should grant a new trial. Although framed in some thirteen points, the arguments can be grouped into four general assertions. The first is that the remarks of plaintiff's counsel in the rebuttal portion of his closing argument constituted prejudice and were in violation of the Court's motion in limine.

The defendants having admitted liability, the Court, at the beginning of the trial, restricted the parties from mentioning the fact that defendants were lawyers, and the action was a legal malpractice action. The excerpted transcript of the closing arguments reveals that on some

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[2] The Court notes that the *Mayer* opinion did not change the standard for a new trial motion. "If reasonable persons could not find that the evidence justifies a decision for a party on each essential element, the court should grant judgment as a matter of law – before trial under Rule 56, later under Rule 50, and using the same federal standard each time. By linking the standard for summary judgment to the standard for overturning a verdict, *Anderson [v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)] and *Celotex [Corp. v. Catrett*, 477 U.S. 317 (1986)] leave no other option." *Mayer*, 29 F.2d at 335.

four occasions in rebuttal, plaintiff's counsel mentioned the nature of the case, or the fact that the defendant was a lawyer. The defendants objected each time, and the Court sustained the objections. However, defendants did not seek to have the inappropriate comments stricken from the record, or to have the jury instructed to disregard the comments.

The comments, although not accidental and clearly inappropriate in light of the Court's ruling, were not of such a nature as to warrant a new trial on the merits. Defendants' objections were sustained, and no request was made for the jury to be instructed to disregard. A new trial is not warranted on this assertion of error.

Defendants next assert that they are entitled to a new trial because they were not permitted to introduce evidence of collectibility. The Court ruled on this issue earlier, and the defendants have not advanced any new arguments that would cause the Court to disturb that ruling.

Defendants next assert that the Court erred when it failed to grant a mistrial when plaintiff's counsel referred to plaintiff having filed Chapter 13 bankruptcy. Although improper, it was, at worst, harmless error by plaintiff, and did not constitute grounds for a mistrial or for a new trial.

Defendants' assertions with respect to jury instructions are mere repetitions of the arguments raised at the jury instruction conference. The Court has considered those arguments and finds no basis for reversing its prior rulings. Defendants' motion for a new trial is, accordingly, DENIED.

MOTION FOR REMITTITUR

Defendants seek remittitur asserting that the jury verdict exceeded the amount of damages established by the evidence. Remittitur is available, again applying the federal standard, if no reasonable person would have returned damages for the plaintiff in the amount of the verdict. *See e.g. Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1558 (7th Cir. 1990) (where the court reversed the award on the finding that it did not "meet the test for rationality in light of all the evidence presented"); *Matter of Innovative Constr. Systems, Inc.*, 793 F.2d 875, 887 (7th Cir. 1986) (where the court stated that a damage award would be reversed if "monstrously excessive," or the "product of passion and prejudice.").

Here defendants assert that the large damage award resulted from the jury's sympathy to the argument that plaintiff and her husband had filed Chapter 13 bankruptcy, and was based on impermissibly admitted evidence of lost earning capacity and future medical expenses.

Plaintiff presented evidence at trial, by her expert, Dr. Grossman, of her lost earning capacity, and her future medical needs through various treating physicians, including Dr. Bailey. The evidence further revealed that plaintiff is a licensed cosmetologist, but is not able to cut hair or do permanents due to her condition. The evidence also revealed that she was licensed in 1979 or 1980, but has not worked since 1981, some six years before her accident. She stopped working in 1981 due to her husband's transfer to another state. The evidence further revealed that she is unable to do handwork, drive long

distances, carry heavy objects, or do housework for very long.

The Court finds that under the reasonable person standard, the award of $230,000 for the present cash value of lost earning capacity reasonably certain to be lost in the future was supported by the evidence. Dr. Grossman testified at length about plaintiff's losses based on her life expectancy, work life, and her training. (Vol. II, pp. 65-67). The jury's calculations of damages were supported by Dr. Grossman's testimony. (*Id.* at pp. 81-85). Dr. Bernstein testified as to the extent of plaintiff's injuries, including her limitations in use of her arms and shoulders. Dr. Bernstein's testimony was that based on her limitations, the plaintiff, a 45 year old woman, was unemployable in the labor market. (*Id.* at 26-28).

Because the verdict was based on the evidence, the Court cannot find that no reasonable person would have returned damages in the amount awarded here. *Accord Pincus*, 893 F.2d at 1558. Albeit a large award, the award was not shocking to the conscious or grossly excessive. Defendants' assertion that it was the product of sympathy due to the reference to plaintiff's bankruptcy is merely speculation, and is not sufficient to warrant remittitur. Therefore, the Court DENIES defendants' alternative motion for remittitur.

CONCLUSION

Accordingly, the Court **DENIES** defendants' post-trial motion on all grounds.

IT IS SO ORDERED.

DATED: 18 October 1994

/s/ William Stiehl
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LORETTA KLUMP,	)	
Plaintiff,	)	
v.	)	CAUSE NO.
J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, a partnership, and ACCIDENT AND INJURY REFERRAL SERVICE,	)	90-CV-3772-WDS
Defendants.	)	

MEMORANDUM AND ORDER

STIEHL, Chief Judge:

Before the Court is defendants' motion for partial summary judgment. For the following reasons, the Court will deny defendants' motion.

This is a legal malpractice action in which plaintiff claims that J. David Duffus and his law firm violated their duty of care by failing to file a personal injury claim on her behalf within the statutory limitations period. Plaintiff is also suing defendant Accident and Injury Referral Service for referring her to an attorney not competent to handle her case.

Plaintiff's personal injury claim arose out of an automobile accident which occurred on January 26, 1987, near Troy, Illinois. On that date, a vehicle driven by Curt Eaves struck plaintiff's vehicle from the rear. Plaintiff alleges

that she suffered serious injuries as a result of the accident, and that a valid cause of action in her favor arose therefrom.

Defendants' motion for partial summary judgment is related solely to the issue of damages. Defendants contend that their liability in this case is limited to the maximum amount plaintiff could have collected from Eaves in the underlying suit. Specifically, defendants seek to identify each potential source of funds from which Eaves could have satisfied a judgment entered against him, and limit plaintiff's recovery in this suit to the sum total of those amounts. In this vein, defendants point to evidence that, at the time of the accident, Eaves was covered by an automobile insurance policy with limits of $25,000 for bodily injuries per person, $25,000 for property damage, and $2,000 for medical payments. **(Defendants' Exhibit F).** Defendants also submitted evidence that plaintiff owned an automobile insurance policy which included underinsured motorist coverage in the amount of $50,000 per person for bodily injuries. **(Defendants' Exhibit H).** Finally, defendants submitted evidence that Eaves is a journeyman welder and owns a home which he purchased for $64,000, $50,000 of which is mortgaged. **(Defendants' Exhibit D at 29).**

Based upon this evidence, defendants conclude that the Court should limit any recovery by plaintiff in this case to $42,000. Defendants derive this figure by adding the maximum they assert Eaves could claim under his insurance policy for bodily injuries, $25,000, plus $3,000 from the same policy for property damages claimed by plaintiff, plus $3,000 from the same policy for property damages claimed by plaintiff, plus $14,000 based upon

the equity in Eaves' home.[1] Defendants do not include any amounts recoverable by plaintiff under the underinsured motorist clause of her automobile insurance policy, but concede that if a claim under that policy was made and rejected or is now barred, the total amount of funds available is $64,000. Finally, defendants invite the Court to raise the ante still further based upon the amount of garnishable wages proven by plaintiff to exist during the lifetime of the judgment.

In response, plaintiff contends that under Illinois law she is required only to prove that the defendant in the underlying case was solvent. Plaintiff argues that the evidence introduced by defendants regarding Eaves' possession of an insurance policy, as well as other, albeit limited, assets, establishes that he would have been able to satisfy at least a portion of any judgment entered against him. Plaintiff concludes that there exists no limitation upon her ability to recover once Eaves' solvency is established.

Fed. R. Civ. P. 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In determining whether to enter summary judgment, "[a]ll factual inferences are to be taken against the moving

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[1] Defendants recognize that Eaves would be entitled to exempt $7,500 of the equity in his home from any judgment, **Ill. Rev. Stat. ch. 110, ¶ 12-901,** but nevertheless concede the entire $14,000 for purposes of this motion.

party and in favor of the opposing party." ***International Admin., Inc. v. Life Ins. Co. of N. Am.,*** **753 F.2d 1373, 1378 (7th Cir. 1985).**

"A legal malpractice action is similar to an ordinary negligence action. The plaintiff-client must prove an attorney-client relationship existed; the duty owed to the plaintiff-client was breached; the attorney's negligence was the proximate cause of injury; and actual damages." ***Nika v. Danz,*** **556 N.E.2d 873, 882 (Ill. App. 1990).** When an attorney is charged with negligently failing to file an action within the statute of limitations, the plaintiff must present evidence regarding both the attorney's conduct and the merits of the underlying case, the latter known as the "trial-within-a-trial." ***Id.*** The trial-within-a-trial is necessary to establish the essential elements of plaintiff's claim, because, if the underlying claims is not meritorious, the attorney's negligence caused no damages. ***Sheppard v. Krol,*** **578 N.E.2d 212 (Ill. App. 1991).**

For the same reason, Illinois courts require the plaintiff in such an action to plead and prove the solvency of the defendant in the underlying claim. ***Id.*** **at 216;** ***Kohler v. Woollen, Brown & Hawkins,*** **304 N.E.2d 677 (Ill. App. 1973);** ***Piper v. Green,*** **216 Ill. App. 590 (1920);** ***Goldzier v. Poole,*** **82 Ill. App. 469 (1899).** Defendants argue that these cases require plaintiff "to prove both the amount of the judgment the plaintiff could have obtained against the underlying tortfeasor and the extent to which the underlying judgment would have been collectible." **(Doc. #63 at 8).**

Defendants mischaracterize plaintiff's burden in this type of case. In establishing the rule under consideration,

the court in *Goldzier* held that the plaintiff must prove "what the actual injury is, by showing the validity of the demand which he has lost, and the fact that it would **in part or in whole** have been realized had the attorney not been negligent." *Goldzier,* **82 Ill. App. at 471 (emphasis added).** This passage is consistent with plaintiff's contention that her burden of proof is satisfied by showing that Eaves possessed funds between January 26, 1987 and January 26, 1989 which would enable him to satisfy, at least in part, any judgment entered against him. ***Accord Jernigan v. Giard,* 500 N.E.2d 806 (Mass. 1986).** Plaintiff is also correct that defendants' evidence regarding Eaves' insurance coverage and employment during that period satisfies this burden. ***See Schlosser v. Tropoli,* 609 S.W.2d 255 (Tex. App. 1980)** (evidence that defendant in underlying claim possessed insurance was sufficient to satisfy requirement of proving a judgment against that defendant was collectible).

Aside from the solvency requirement established in *Goldzier,* Illinois courts have not directly addressed the extent to which evidence of the underlying defendant's net worth is admissible for the purpose of limiting plaintiff's recovery against the attorney defendant. Most courts in other jurisdictions allow such evidence, though they differ on which party bears the burden of proof on the issue. ***See, e.g. Hoppe v. Ranzini,* 385 A.2d 913 (N.J. Super. 1978)** (noting rationale of many courts that only damages collectible against the underlying defendant are proximately caused by the attorney's malpractice); ***McDow v. Dixon,* 226 S.E.2d 145 (Ga. 1976)** (burden of proof as to collectibility is on the plaintiff); ***Jourdain v. Dineen,* 527 A.2d 1304 (Me. 1987)** (uncollectibility of a

judgment is a matter of avoidance or mitigation which must be pleaded and proved by the defendant). To the extent such evidence is deemed admissible, some courts suggest employing a bifurcated proceeding in which evidence of the underlying defendant's financial circumstances is allowed only after the jury determines the validity of the underlying claim an the total damages sustained by the plaintiff. ***Hoppe,* 385 A.2d at 919; *McDow,* 226 S.E.2d at 147.**

However in ***Hoppe,*** a New Jersey court expressed reluctance to adopt the majority rule. The court noted the principles that a defendant's negligence need not be the sole proximate cause of the plaintiff's damages, but only a proximate cause, and that a tortfeasor is generally liable for all reasonably foreseeable damages. The court concluded that a rule limiting the plaintiff's recovery to the precise amount collectible in the underlying suit could "effect a change in or departure from the concept of proximate causation and the measure of damages in negligence actions generally, including other kinds of attorney malpractice cases and malpractice suits involving other professions." ***Hoppe,* 385 A.2d at 917.** The court also noted the fiduciary nature of the attorney-client relationship, and the profession's effect upon the public welfare, suggesting that public policy favors imposition of the entire amount of the judgment lost on the negligent attorney.

The Court need not decide the issue at this time, however, because even if plaintiff's recovery is limited to the amount collectible in the underlying suit, defendants

have failed to establish that amount with sufficient certainty to justify the relief requested. In Illinois, a judgment is enforceable for seven years from the date it is rendered, **Ill. Rev. Stat. ch. 110, ¶ 12-108,** and may be revived thereafter for a period of twenty years from the date of the judgment. **Ill. Rev. Stat. ch. 110, ¶ 13-218.** Illinois law also provides for garnishment and wage deductions for the purpose of satisfying claims against a judgment debtor. **Ill. Rev. Stat. ch. 110, ¶¶ 12-701 to -819.** Defendants submitted evidence that Eaves earned between $28,000 and $32,000 per year from 1987 through 1991. **(Defendants' Exhibit D at 14-15).** Defendants concede that any portion of Eaves' earnings subject to garnishment or wage reduction should be included in determining the collectibility of the underlying judgment. They argue, however, that the burden is upon plaintiff to come forward with such evidence, and that in the absence of such a showing the Court should not consider Eaves' income.

Defendants' argument ignores the rule that summary judgment is inappropriate when it is apparent from the materials submitted by the movant that a genuine issue of fact remains. ***Cooper v. Lane*, 969 F.2d 368 (7th Cir. 1992); *Herman v. City of Chicago*, 870 F.2d 400 (7th Cir. 1989).** It is clear from the evidence submitted by defendants that an issue remains as to the extent of Eaves' earnings, and the portion of such earnings subject to garnishment or wage reduction. Accordingly, defendants' motion for partial summary judgment is **DENIED.**

IT IS SO ORDERED.

DATED: 22 February 1993

/s/ William D Stiehl
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LORETTA KLUMP, Plaintiff, v. J. DAVID DUFFUS, JR. LAW OFFICES OF DIXON, DUFFUS & DOUB, a partnership, and ACCIDENT AND INJURY REFERRAL SERVICE, Defendants.	)	CAUSE NO. 90-CV-3772-WDS

MEMORANDUM AND ORDER

STIEHL, Chief Judge:

Before the Court are motions in limine filed by each party in this attorney malpractice action.

Plaintiff alleges that she suffered severe injuries in an automobile accident negligently caused by Curt Eaves on January 26, 1987, near Troy, Illinois. Plaintiff claims that defendants Duffus and his law firm violated their duty of care by failing to file her injury claim on her behalf within the statutory limitations period. Plaintiff has also sued Accident and Injury Referral Service for negligently referring her to an incompetent attorney.

Plaintiff's first motion in limine requests exclusion of evidence related to the poverty, wealth, or general financial condition of Curt Eaves, the driver of the automobile involved in plaintiff's accident. Plaintiff has also moved the Court to exclude any evidence associated with the

insurance coverage of any party. For the reasons stated below, the Court **GRANTS** plaintiff's motions.

Throughout this case, defendants have asserted that plaintiff's claims should be limited to the amount that she can affirmatively prove would have been recovered from Eaves, the driver involved in the 1987 car accident. In an attorney malpractice action for failure to file within the limitations period, the plaintiff must present a "trial-within-a-trial" proving the negligence claim against the attorney and the merits of the underlying claim. ***Nika v. Danz*, 556 N.E.2d 873, 882 (Ill. App. 1990).** The trial-within-a-trial is necessary because the negligent attorney has caused damages only if the underlying claim would have been successful. ***Sheppard v. Krol*, 578 N.E.2d 212 (Ill. App. 1991).** To establish that damages would have been recovered on the underlying claim, Illinois law requires the plaintiff to prove "what the actual injury is, by showing validity of the demand which he has lost, and the fact that it would **in part or in whole** have been realized had the attorney not been negligent." ***Goldzier v. Poole*, 82 Ill. App. 469, 472 (1899).**

Although defendants failed to respond to plaintiff's motions in limine, they have previously argued that Illinois law requires plaintiff to prove specific damages recoverable from Eaves. ***Goldzier*** does not support this position, as it holds that plaintiff can satisfy her burden by showing that at least part of any judgment against Eaves would have been recovered.

Defendants' argument overlooks Illinois statutes allowing a judgment to be collected over a twenty-year period. **735 ILCS 5/12-108, 5/13-218.** Plaintiff would have

had twenty years to collect any part of a judgment against Eaves. Defendants' argument also contradicts policy considerations in the attorney malpractice area. *See* ***Hoppe v. Ranzini,*** **385 A.2d 913 (N.J. Super. 1978).** Although defendants allegedly failed to file plaintiff's claim and assumedly failed to investigate Eaves' financial condition prior to expiration of the limitations period, they seek to benefit from the fortuity that a judgment debtor might not have been able to pay all of plaintiff's damages. Public policy certainly discourages such a result.

The Illinois case law and policy considerations discussed above support plaintiff's motion in limine to exclude evidence of the insurance coverage of Eaves or any other party. For the same reasons that defendants cannot limit plaintiff's damages by showing the financial condition of Eaves, defendants also cannot present evidence of insurance to limit plaintiff's damages. The relevance of such evidence of insurance is highly questionable in this action, and in addition, such evidence should be excluded under **Fed. R. Evid. 403.** In determining the admissibility of evidence, a court must balance probative value against countervailing factors, including the danger of unfair prejudice, confusion of the issues, misleading the jury, and considerations of undue delay. ***Id. Empire Gas Corp. v. American Bakeries Co.,*** **646 F. Supp. 269 (N.D. Ill. 1986).** Even if insurance evidence is relevant, its probative value to this lawsuit is miniscule. Evidence of insurance would unnecessarily confuse the jury and muddle the issues surrounding the alleged negligence of the defendants and Eaves. For the foregoing reasons, plaintiff's motions in limine are **GRANTED.**

Defendants have filed a motion in limine requesting the exclusion of evidence regarding plaintiff's claims of lost earning capacity and lost income. Defendants contend that all evidence related to these claims should be refused because plaintiff's expert has no reasonable basis for his opinion concerning plaintiff's claims, and that these claims are speculative.

The decision to admit expert testimony is committed to the broad discretion of the trial court. ***Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788 (7th Cir. 1989).** Defendants have asked this Court to completely bar plaintiff's expert from testifying as to plaintiff's lost earning capacity and lost wages claims. The Seventh Circuit has held that "any questions regarding [an expert's] methodology or particular area of expertise were more appropriately addressed during cross-examination. . . . Experience and knowledge establish the foundation for an expert's testimony; the accuracy of such testimony is a matter of weight and not admissibility." ***Id.* at 797, *quoting Bright v. Land O'Lakes, Inc.*, 844 F.2d 436, 441 (7th Cir. 1988).** The Court will not bar plaintiff's expert from testifying. Defendants will receive full opportunity to challenge the basis for the expert's opinion on cross-examination.

Defendants have also requested the Court to exclude any evidence concerning plaintiff's claim for lost wages and earning capacity. Impairment of earning capacity and lost wages are elements of damages properly submitted to a trier of fact. ***Robinson v. Greeley and Hansen*, 449 N.E.2d 250 (Ill. App. 1983).** However, the Court recognizes that the plaintiff can only recover lost wages and earning capacity damages that are reasonably certain to

occur. *Id.* at 254. The Court will not exclude all evidence related to these claims but to recover, plaintiff must show that such damages are reasonably certain to occur.

Accordingly, plaintiff's motions in limine are **GRANTED**, and defendants' motion in limine is **DENIED**. It is hereby **ORDERED**:

That defendants and their counsel are ordered not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly those matters on which the Court granted plaintiff's motions in limine or the fact that the motions were filed. Counsel for defendants shall counsel each and every one of their witnesses to follow these instructions.

IT IS SO ORDERED.

DATED: 10 September 1993

/s/ William D Stiehl
CHIEF JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

LORETTA KLUMP

v.

J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, a partnership, and ACCIDENT AND INJURY REFERRAL SERVICE

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 90-cv-3772-WDS

[X] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, LORETTA KLUMP, and against the defendants, J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, a partnership, and ACCIDENT AND INJURY REFERRAL SERVICE, pursuant to the jury verdict of February 17, 1994, in the amount of Four Hundred Seventy-Four Thousand Dollars ($474,000.00), as follows

The reasonable expense of past medical and medically related expenses:	$ 14,000.00
The present cash value of future reasonable medical and medically related expenses	

reasonably certain to be necessary in the future:	$ 51,000.00
The disability, pain, and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries:	$123,000.00
The value of the loss of earning capacity:	$ 56,000.00
The present cash value of the loss of earning capacity reasonably certain to be lost in the future:	$230,000.00
TOTAL	**$474,000.00**

February 18, 1994
Date

STUART J. O'HARE
Clerk

/s/ Sandra K. Pannier
(By) Deputy Clerk

(2)

No. 95-1472

Supreme Court, U.S.
FILED
MAY 14 1996

In The

Supreme Court of the United States

October Term, 1995

LORETTA KLUMP,

Petitioner,

vs.

J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, A PARTNERSHIP and ACCIDENT AND INJURY REFERRAL SERVICE,

Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Seventh Judicial Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI FAILS TO IDENTIFY ANY COMPELLING REASON FOR THIS COURT TO ISSUE THE WRIT AND PROVIDE PETITIONER WITH ANOTHER REVIEW OF THE DISTRICT COURT'S TRIAL ERRORS.

Petitions for writ of certiorari are granted only for compelling reasons. Sup. Ct. R. 10. A review on a writ of certiorari is not a matter of right, but is directed to the discretion of the Supreme Court. *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70 (1955). The Supreme Court has determined that the jurisdiction given by statute should be exercised sparingly and with caution. 28 U.S.C. § 1254(1); *American Constr. Co. v. Jacksonville, T.& K. W. Ry.*, 148 U.S. 372, 383 (1893); *In re Woods*, 143 U.S. 202 (1892). The writ will not issue merely to accord another hearing to a party defeated in the court of appeals. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Principally, certiorari jurisdiction is used to resolve conflicts among circuit court of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10.

No federal question was decided against petitioner in this case. There was certainly no departure from the accepted and usual course of judicial proceedings to invoke the need for this Court's supervisory powers. *See* Sup. Ct. R. 10(a). There are no compelling reasons to grant this petition for writ of certiorari. The court of appeals correctly applied Illinois tort law concerning the amount of damages proximately caused by respondents' failure to file a timely lawsuit for Klump's injuries resulting from an automobile accident. *Klump v. Duffus*, 71 F.3d 1368 (7th Cir. 1995). The court ruled that the burden is on plaintiff in a legal malpractice claim "to prove the amount she

would have actually collected from the original tortfeasor" had the malpractice not occurred. *Klump*, 71 F.3d at 1374.

Petitioner asserts that her petition should be granted because the Circuit Court of Appeals for the Seventh Circuit misinterpreted a decision of an intermediate appellate court of Illinois. (Petition, pp.5-6). A reading of *Goldzier v. Poole*, 82 Ill. App. 469 (1899) shows that the circuit court of appeals did not misinterpret Illinois law concerning damages in a legal malpractice case and, in fact, gave the *Goldzier* opinion the logical interpretation consistent with its language and consistent with the subsequent Illinois appellate court cases of *Shepard v. Krol*, 218 Ill. App. 3d 254, 260, 578 N.E. 2d 212, 216 (1991) and *Kohler v. Woollen, Brown & Hawkins*, 15 Ill. App. 3d 455, 458, 304 N.E. 2d 677, 678 (1973). *Klump*, 71 F.3d at 1374. Petitioner's argument that the decision of the circuit court of appeals was a departure from "clear Illinois authority" (Petition, p.12) is disingenuous because she also admits that the "actual injury" language in *Goldzier* is capable of two different interpretations, one of which supports the reasoning of the circuit court of appeals. (Petition, p.7).

The court of appeals correctly observed that the holding of *Goldzier* never reached the issue presented in this case where an underlying tortfeasor is only partially able to satisfy a hypothetical judgment against him. A federal court sitting in diversity, as in the instant case, is bound to decide questions of law in accordance with its determination of how the highest court of the applicable state would decide such issues. *Aetna Casualty & Sur. v. Farrell*, 855 F.2d 146, 148 (3d Cir. 1988); *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1264 (3d Cir. 1991). Applying that accepted rule of construction, the circuit court of appeals was justified in reviewing Illinois authorities, including *Goldzier*, as well as the law of other jurisdictions in determining the law applicable to this case. Petitioner does not contest that every

other state or federal court which has decided the issue has found that damages are limited to the extent that the underlying hypothetical judgment is collectible. Further, petitioner does not contest that all courts considering the issue, except for one decision in Maine, places the burden to prove the amount collectible upon the plaintiff. *See Klump*, 71 F.3d at 1374. Petitioner merely argues that the numerous and uniform decisions from other jurisdictions should be ignored. (Petition, p. 12).

Contrary to the suggestion by petitioner, the *Klump* opinion does not involve "the regulation of the practice of law." (Petition, p. 6). Petitioner's suit in the district court was a suit for tort damages and does not concern the regulation of the practice of law.

Petitioner's statement that clients who sue their lawyers in federal courts in Illinois have a "more complex burden of proof" than those who sue in Illinois state courts is untrue. (Petition, p. 6). The court, citing Joseph H. Koffier, *Legal Malpractice Damages in a Trial Without a Trial — A Critical Analysis of Unique Concepts: Areas of Unconstitutionality*, 73 Marq. L. Rev. 40, 52 (1989), observed that placing the burden on the plaintiff to prove collectibility made malpractice conceptually identical to all other negligence cases. *Klump*, 71 F.3d at 1374. Petitioner's confession that it is impossible for her to prove damages in this case (Petition, p. 11) is no reason to abandon basic tort principles.

The court of appeals correctly noted that the purpose of damages in a tort action is to place the plaintiff in the same position she would have been in had the tort not occurred. The court further noted that if the tort had not occurred petitioner would have obtained a judgment against the underlying tortfeasor, but her recovery, and thus her actual damages in the

malpractice action, would have been limited to the amount she was able to collect. *Klump*, 71 F.3d at 1374. In any event, petitioner did not raise the issues relating to the difficulty of proving collectibility before the court of appeals issued its opinion and she cannot raise them now. (Petition, p. 11).

Pursuant to Supreme Court Rule 15.2, respondents advise the Court that petitioners' assertion that respondents do not suggest Klump was injured less than would justify the $474,000 she was awarded (Petition, p.7) is untrue. Respondents strongly contested petitioner's claimed injuries and damages at trial and on appeal urged several trial errors relating to the evidence concerning alleged damages and the violations of the orders in limine by petitioner's counsel in closing argument which had the effect of increasing the amount of damages awarded. The court of appeals stated it would not address those errors concerning the amount of damage the jury awarded because it was remanding the case for a new trial. *Klump*, 71 F.3d at 1375 n. 9.

CONCLUSION

The Circuit Court of Appeals for the Seventh Circuit considered the record on appeal and the briefs of the parties and drafted a well-reasoned opinion. Petitioner's Petition for Rehearing *En Banc* was presented and denied. A proper construction of the *Goldzier* decision, other Illinois cases, the overwhelming weight of authority from other jurisdictions, and the principles of tort damages establish not only that no compelling reason exists for further review, but also that the court of appeals decision is unquestionably correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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